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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-6156

MALLIE LEWIS,

Appellant,

versus

CITY OF NEW ORLEANS,

Appellee.

APPELLEE'S BRIEF ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

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STATEMENT OF THE CASE

On April 17, 1970, in the First Municipal Court for the City of New Orleans, Mallie Lewis was convicted and sentenced to pay fines of $10.00 or to serve terms of ten days each for the crimes of reviling the police and resisting arrest, in violation of New Orleans ordinances 828 M.C.S. 49-7 and 828 M.C.S. 49-2. Alleging the unconstitutionality of the reviling ordinance (828 M.C.S. 49-7), Lewis duly filed an appeal with the Criminal District Court for the Parish of Orleans. On December 15, 1970, that court affirmed Lewis' convictions finding the ordinance constitutional.

Lewis then made application to the Supreme Court of Louisiana for writs. On March 10, 1971, the application was denied. *City of New Orleans v. Lewis,* 244 So.2d 860, 257 La. 993. On June 7, 1971, Lewis lodged an appeal in this Court. On June 26, 1973, this Court vacated the Supreme Court of Louisiana's judgment and remanded the case to the Supreme Court of Louisiana for reconsideration in light of *Gooding v. Wilson,* 405 U.S. 92, 92 S.Ct. 1103 (1972).

On remand the Supreme Court of Louisiana affirmed Lewis's conviction holding the ordinance in question constitutional. *City of New Orleans v. Lewis,* 263 La. 809, 269 So.2d 450 (1972). From that decision, Lewis has filed this appeal before this Court.

ARGUMENT

The Supreme Court of Louisiana has found that this ordinance in question before this Court (828 M.C.S. 49-7) is not unconstitutionally vague and overbroad. That Court has found that the City of New Orleans ordinance and the statute in question in *Gooding v. Wilson,* supra, are not similar, they can be readily distinguished.

The New Orleans ordinance states:

> "It shall be unlawful and a breach of the peace for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the City police while in the actual performance of his duty."

The Georgia statute, which was the major issue in *Gooding*, supra, made it an offense for any person ". . . without provocation to use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace". *Gooding*, supra, at 1104.

It is clear that a vital differentiation appears between these two statutes. The second portion of the New Orleans ordinance states that revilings must occur "*while in the actual performance* of his (the policeman's) duty". (Emphasis added) The Georgia statute does not limit opprobrious words or abusive language to the narrow field of reviling the police while he is endeavoring to perform his official functions.

In citing *NAACP v. Button*, 371 U.S. 415 at 433 (1963), this Court stated in *Gooding*, supra: "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity". However, later in the opinion of the Court, this area is defined: "The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the state's consitutional power to regulaer can justify limiting First Amendment freedoms". Id at p. 438. The City of New Orleans as an arm of the State of Louisiana has a compelling interest in preserving the efficient and effective operation of its police department, this in turn provides for law and order on the streets. Wanton interference with a policeman while he is endeavoring to discharge his duties creates a threat to the community at large. In *Feiner v. People of the State of*

New York, 340 U.S. 315, 71 S.Ct. 303 (1951), the Court stated, "This Court respects, as it must, the interest of the community in maintaining peace and order on its streets". Also, this Court has noted that, "When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace or order appears, the power of the state to prevent or punish is obvious". *Cantwell v. State of Connecticut*, 310 U.S. 296, 60 S.Ct. 900 (1940). Thus, because a vital State interest here is in question, i.e., the efficient operation of an officer of the law while in the discharge of his duties, the ordinance should not be struck down as intruding on First and Fourteenth Amendment freedoms.

A unanimous decision of this Court is *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 62 S.Ct. 766 (1942), said:

> "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words — those by which their very utterance inflict injury or tend to incite breach of the peace."

The above cited case deals with a state statute and factual circumstances very similar to the case at bar. In *Chaplinsky*, supra, he appellant was convicted in violation of a statute that read as follows:

> "No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation."

This Court upheld the conviction in *Chaplinsky*, supra, saying at p. 573: "We are unable to say that the statute as thus construed contravenes the constitutional right of free expression".

The line of decisions since *Chaplinsky* have consistently affirmed the state's right to punish "fighting words". In this connection, the Louisiana Supreme Court in its opinion in the case before this Court said at p. 456:

> "We find and believe that is self evidence that what is prohibited (by the ordinance) are 'fighting words' which cannot enjoy the protection of the First and Fourteenth Amendments to the United States Constitution. We find that under the above authorities of the United States Supreme Court it was within the power of the City of New Orleans, as an arm

of the State, to regulate the conduct of any person towards member of the city police while in the actual performance of his duty by prohibiting the use of fighting words to such policemen."

Further, the Louisiana Supreme Court stated:

"The Section definitely does not sweep within its proscriptions all forms of abusive and derogatory speech. The proscriptions are narrow and specific — wantonly cursing, reviling, and using obscene or opprobrious language." Id at 456.

Appellee argues that this Court consider two cases decided by this Court in 1971, *Coates v. City of Cincinati,* 402 U.S. 611, 91 S.Ct. 1686 (1971), and *Cohen v. California,* 403 U.S. 15, 91 S.Ct. 1780 (1971). Both of these cases strike down local ordinances for being too vague and overbroad. It is contended that both these cases are readily distinguishable from the case at bar.

In *Coates,* supra, the ordinance forbade "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by . . ." As noted by this Court, "the ordinance is vague not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all". Id at 1688.

In the case at bar, the New Orleans ordinance clearly sets out the standard of conduct that is forbidden, i.e., the wanton cursing, reviling, or using obscene or opprobrious language. This ordinance expressly states that such actions must be directed towards "any member of the City police" and furthermore, "while in the actual performance of his duty". Therefore, it sets a standard of conduct which would necessarily have to interfere with the official execution of a policeman's duties.

This Court in *Coates*, supra, was a markedly divided one. Mr. Justice Stewart delivered the opinion of the Court. Mr. Justice Black filed a separate opinion. Mr. Justice White filed a dissenting opinion in which Mr. Chief Justice Burger and Mr. Justice Blackman joined. Essentially, the Court was divided five to four on the question of whether the ordinance was unconstitutional on its face. Quoting from Mr. Justice Black's separate opinion, Id at 1689, 1690:

> "On the other hand, laws which plainly forbid conduct which is within the power of the State to forbid but also restrict constitutionally protected conduct may be void either on their face or merely as applied in certain instances. As my Brother White states in his opinion (with which I substantially agree) this is one of those numerous cases where the law could be held unconstitutional because it prohibits both conduct which the Constitution safeguards and conduct which the State may constitutionally punish. Thus, the First Amendment which for-

> bids the State to abridge i. edom of speech, would invalidate this city ordinance if it were used to punish the making of a political speech even if the speech were to annoy other persons. In contrast however the ordinance could properly be applied to prohibit the gathering of persons in the mouths of alleys to annoy passers-by by throwing rocks or by some other conduct not at all connected with speech."

As said before, the New Orleans ordinance does not suffer from the faults of the Cincinnati ordinance. The conduct prohibited is clear; the standard of such conduct is specific.

Cohen v. California, supra, held that "absent a more particularized and compelling reasons for its actions, the State may not make the simple public display here involved of the single four letter word explicative a criminal offense". The case involved the appellant wearing a jacket bearing the words "Fuck the Draft" in the corridor of the Los Angeles courthouse. In the case at bar, the conduct of appellant was not the passive display of the controversive words as it was in *Cohen*. Here the appellant addressed the obscenities directly toward the policeman. In the *Cohen* opinion, Mr. Justice Harlan said Id at p. 20, "While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion in the instance it was clearly not 'directed to the person of the hearer' ". *Cantwell v. Connecticut*, supra, at p. 309.

CONCLUSION

It is therefore contended that due to prior decision of this Court and to the particularized scope of Section 49-7 of the Code of the City of New Orleans where wanton cursing and reviling must occur while in the performance of his duty and to the construction of this ordinance as given by the Supreme Court of Louisiana, that the ordinance is not vague and overbroad as contended by appellant and is not in violation of the Constitution of the United States.

Respectfully submitted,

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PROOF OF SERVICE

STATE OF LOUISIANA
PARISH OF ORLEANS

I, Servando C. Garcia, III, attorney of record for the City of New Orleans, appellee herein, being duly sworn do depose and say that on the 10th day of September, 1973, I served a copy of the foregoing typewritten brief on Mallie Lewis by mailing copies of same, postage prepaid to

John Wilson Reed
2735 Tulane Avenue
New Orleans, Louisiana 70119

All parties required to be served have been served.

/s/ SERVANDO C. GARCIA, III
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Sworn to and subscribed
before me this 10th day
of September, 1973.

/s/ ROBERT H. BELKNAP
NOTARY PUBLIC